76-635

No.

Supreme Court, U. S.
FILED
NOV 4 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES STEEL CORPORATION, *et al.* ON BEHALF OF THEMSELVES AND ALL PERSONS SIMILARLY SITUATED,
Appellants,

v.

MULTISTATE TAX COMMISSION, *et al., Appellees.*

On Appeal from the United States District Court for the Southern District of New York

---

JURISDICTIONAL STATEMENT

ERWIN N. GRISWOLD
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

THOMAS McGANNEY
14 Wall Street
New York, New York 10005

Attorneys for Appellants

Of Counsel:

JONES, DAY, REAVIS & POGUE
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

RICHARD A. HOPPE
TODD B. SOLLIS

WHITE & CASE
14 Wall Street
New York, New York 10005

SHEARMAN & STERLING
53 Wall Street
New York, New York 10005

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
Opinion Below	2
Jurisdiction	3
Questions Presented	3
Constitutional and Statutory Provisions Involved	4
Statement	5
Proceedings Below	7
The Questions Are Substantial	10
I. The Compact Clause	10
A. The Scope of the Compact Clause	10
B. The Effect on States Not Party to the Compact	16
C. Effect of the Compact on the National Interest	21
II. The Commerce Clause	25
III. Fourteenth Amendment	27
Conclusion	28

The Appendix Is Separately Bound

CITATIONS

Butler Bros. v. *McColgan*, 315 U.S. 501 (1942)	17
Green v. *Biddle*, 8 Wheaton 1 (1823)	12
Hans Rees' & Sons v. *North Carolina*, 283 U.S. 123 (1931)	27
Holmes v. *Jenison*, 14 Peters 540 (1840)	10, 12
McCulloch v. *Maryland*, 4 Wheaton 316 (1919)	23
New Hampshire v. *Maine*, decided June 14, 1976	9, 10, 11, 12, 15
North Carolina v. *Tennessee*, 235 U.S. 1 (1914)	10, 11
Northwestern States Portland Cement Co. v. *Minnesota*, 358 U.S. 450 (1959)	5, 22
Panhandle Oil Company v. *Mississippi ex rel. Knox*, 277 U.S. 218 (1928)	23

Page

Virginia v. *Tennessee*, 148 U.S. 503 (1893) .. 9, 10, 11, 12, 15
Virginia v. *West Virginia*, 246 U.S. 565 (1918) 10, 11
West Virginia ex rel. Dyer v. *Sims*, 341 U.S. 22 (1950) 12, 14
Wharton v. *Wise*, 153 U.S. 155 (1894) 10, 11, 23

CONSTITUTION AND STATUTES:

Constitution of the United States
Article I, Section 8 (Commerce Clause) 3, 4
Article I, Section 10 (Compact Clause) 3, 4, 10
Fourteenth Amendment (Due Process Clause) ... 4

Act of September 14, 1959, P.L. 86-272, 73 Stat. 555 .. 5, 22

Act of April 14, 1965, P.L. 89-11, 79 Stat. 58 13

Multistate Tax Compact (Appendix E) 54a

Uniform Division for Income Tax Purposes Act (UDITPA) 20

MISCELLANEOUS:

Cappetta, 33 Instit. on Fed. Tax (N.Y.U.) 1961 17
CCH Tax Treaties 19, 23
Corrigan, 29 Vand. L. Rev. 423 ..... 17, 18, 19, 20, 27
Dexter, 29 Vand. L. Rev. 401 ..... 19, 20
Engdahl, 64 Mich. L. Rev. 63 ..... 12, 13
Frankfurter & Landis, 34 Yale L.J. 685 14
H.R. 11798, 89th Cong., 2d Sess. 18, 21, 22
H.R. 16491, 89th Cong., 2d Sess. 21
H.R. 9476, 90th Cong., 1st Sess. 7
H.R. 13682, 90th Cong., 1st Sess. 7
H.R. 6246, 91st Cong., 1st Sess. 7
H.R. 9873, 91st Cong., 1st Sess. 7
H.R. 6160, 92d Cong., 1st Sess. 7

Page

H.R. 1538, 92d Cong., 1st Sess. 18, 22
H.R. 977, 93d Cong., 1st Sess. 18, 22
H.R. 9, 94th Cong., 1st Sess. 18, 22
H.R. Rep. No. 1480, 88th Cong., 2d Sess. 18, 22
H.R. Rep. No. 102, 89th Cong., 1st Sess. 13
H.R. Rep. No. 565, 89th Cong., 1st Sess. 18, 22
H.R. Rep. No. 952, 89th Cong., 1st Sess. 18, 22
Hearings Before the Subcommittee on State Taxation of Interstate Commerce of the Senate Committee on Finance, 93d Cong., 1st Sess. 18, 23
Interstate Compacts 1783-1956 12
Multistate Tax Commission Annual Reports, 1968-1975 7, 17, 18, 19
Note, 75 Harv. L. Rev. 953 14
P-H State and Local Taxes, All States Unit 16
Ridgeway, Interstate Compacts: A Question of Federalism 12
Sharpe, 11 Col. J. Law & Soc. Problems 231 .... 16, 17, 18
II Story, Commentaries on the Constitution of the United States 1403 12
S. 3892, 89th Cong., 2d Sess. 7
S. 883, 90th Cong., 1st Sess. 7
S. 1551, 90th Cong., 1st Sess. 7
S. 1198, 91st Cong., 1st Sess. 7, 22
S. 317, 92d Cong., 1st Sess. 18, 19, 22
S. 1883, 92d Cong., 1st Sess. 7
S. 3333, 92d Cong., 2d Sess. 7

Page

S. 1245, 93d Cong., 1st Sess. 22

S. 2092, 93d Cong., 1st Sess. 7

S. 2080, 94th Cong., 1st Sess. 18, 19

S. Rep. No. 76, 89th Cong., 1st Sess. 13

The Book of the States 12

The Federalist (No. 43) 11, 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No.

UNITED STATES STEEL CORPORATION, *et al.* ON BEHALF OF THEMSELVES AND ALL PERSONS SIMILARLY SITUATED,
Appellants,

v.

MULTISTATE TAX COMMISSION, *et al., Appellees.*

On Appeal from the United States District Court for the Southern District of New York

---

JURISDICTIONAL STATEMENT

The appellants[1] file this appeal to review the judgment of the United States District Court for the

---

[1] The plaintiffs below were United States Steel Corporation, Standard Brands Incorporated, General Mills, Inc., and The Procter & Gamble Distributing Company. On February 5, 1974, the court below permitted Bristol Myers Co., Eltra Corporation, Goodyear Tire and Rubber Company, Green Giant Company, International Business Machines Corporation, International Harvester Company, International Paper Company, International Telephone and Telegraph Corporation, McGraw-Hill, Inc., NL Industries, Inc., Union Carbide Corporation, and Xerox Corporation to intervene as plaintiffs. International Business Machines and Xerox withdrew as inter-

Southern District of New York entered July 14, 1976, granting appellees[2] summary judgment and upholding the constitutionality of the Multistate Tax Compact, and submit this Statement to show that this Court has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the District Court (Appendix A, *infra*, pp. 1a-21a)[3] is reported in 417 F. Supp. 795. An earlier opinion (Appendix B, *infra*, pp. 22a-47a), on motion to dismiss, is reported at 367 F. Supp. 107 (S.D. N.Y. 1973).

venor plaintiffs before decision. The Court also ordered that the suit proceed as a class action.

The original plaintiffs and the remaining intervenors are the appellants here.

[2] Appellees named as defendants in the case below are the Multistate Tax Commission, Eugene P. Corrigan, Executive Director of the Multistate Tax Commission, and Eric E. Wohlforth (Alaska), Richard Heath (Arkansas), John H. Heckers (Colorado), J. Ed. Straughn (Florida), Ralph W. Kondo (Hawaii), Ewing H. Little (Idaho), Jas. O. Mathis (Indiana), James T. McDonald (Kansas), Allison Green (Michigan), James Schaffner (Missouri), J. Morley Cooper (Montana), Wm. E. Peters (Nebraska), John J. Sheenan (Nevada), Fred L. O'Cheskey (New Mexico), Bryon L. Dorgan (North Dakota), Charles H. Mack (Oregon), Robert F. Calvert (Texas), Vernon L. Holman (Utah), George Kinnear (Washington) and E. S. MacClean (Wyoming), all Commissioners of the Multistate Tax Commission from their respective states. George E. Mahin, Tax Commissioner of the State of Illinois, was named as a defendant at the start of the suit, but Illinois withdrew from the Multistate Tax Compact and the Multistate Tax Commission on August 29, 1975, and Mahin was not listed as a defendant in the lower court's caption of the case. Florida also withdrew from the Compact, effective October 1, 1976. Since the suit was started, California and South Dakota have become members of the Multistate Tax Compact and Commission. Alabama has adopted the Compact subject to the consent of Congress.

[3] The Appendix is separately bound. The pages are numbered with an "a" suffix in order to distinguish them from the pages in this Jurisdictional Statement.

JURISDICTION

The complaint in this case sought declaratory and injunctive relief against implementation and enforcement of state statutes constituting a compact between the states, as contrary to the Constitution of the United States. The action was heard by a three judge district court pursuant to 28 U.S.C. §§ 2281, 2284.

The judgment of the District Court was entered July 14, 1976 (Appendix C, *infra*, pp. 49a-50a), and notice of appeal was filed in that court on September 7, 1976 (Appendix D, *infra*, p. 51a).

Jurisdiction to review the judgment is conferred on this Court by 28 U.S.C. 1253.

QUESTIONS PRESENTED

1. Whether the Multistate Tax Compact, as enacted and applied, is invalid because it has failed to obtain the consent of Congress, in violation of Article I, Section 10 of the Constitution of the United States.

2. Whether the Multistate Tax Compact, as enacted and applied, is invalid because it impermissibly burdens interstate commerce in violation of Article I, Section 8 of the Constituton of the United States.

3. Whether the Multistate Tax Compact, as enacted and applied, is invalid because it fails to provide adequate notice, standards of conduct,

and remedies to those which it seeks to regulate, in violation of Section 1 of the Fourteenth Amendment.

4. Whether the District Court erred in deciding the case upon a motion for summary judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 10 of Article I of the Constitution of the United States provides in part:

> "No state shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . ."

Section 8 of Article I of the Constitution of the United States provides, in part:

> "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States . . ."

Section 1 of the Fourteenth Amendment of the Constitution of the United States provides , in part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Multistate Tax Compact is set out in Appendix E, *infra*, pp. 54a-79a.[4]

---

[4] The version in the Appendix is the model version. The state code citations are as follows: Alaska, Alas.Stat. § 43.10.010; Arkansas, Ark.Stat. 1947, § 84-4101; Colorado, Colo.Rev.Stat. 1973, Art. 24-60-301; Florida, Fla.Stat.Ann. § 213.15, repealed Fla. Sessions Law 76-149; Hawaii, Hawaii Rev.Stat. § 255-1; Idaho, Idaho Code § 63-3701; Indiana, Burns' Ind.Stat.Ann. § 6-8-9-101; Kansas, Kan. Stat.Ann. § 79-4301; Michigan, Mich.Comp.Laws Ann. § 205.581; Missouri, Mo.Rev.Stat., 1969, § 32.200; Montana, Mont.Rev.Code 1947, § 84-6701; Nebraska, Neb.Rev.Stat. 1943, § 77-2901; Nevada, Nev.Rev.Stat. § 376.010; New Mexico, N.M.Stat.Ann. 1953 § 72-15A-37, 44; North Dakota, N.D.Cent.Code, § 57-59-01; Oregon, Or. Rev.Stat. § 305.655; Texas, Tex.Civil Stat., Art. 7359a; Utah, Utah Code Ann. 1953, § 59-22-1; Washington, Wash.Rev.Code Ann., § 82.56; Wyoming, Wyo.Stat. 1957, § 39-376. California adopted the Compact effective January 1, 1976. Deering Calif. Code Ann. § 38001. South Dakota became a member July 1, 1976. S.D.Comp. Laws 10-54.

STATEMENT OF THE CASE

The Multistate Tax Compact was drafted during 1966 following this Court's decision in *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450 (1959), and as an aftermath of deliberations in Congress which led to the enactment of the Act of September 14, 1959, P.L. 86-272, 73 Stat. 555. The Compact became effective by its own terms on August 4, 1967 when the seventh state adopted it. Twenty-one states have now joined in the Compact by statutory enactment.

Article VI of the Compact creates the Multistate Tax Commission, an independent body designed to implement and administer the Compact. The Commission is composed of one member from each of the participating states, who together appoint an Executive Director as chief administrator of the Compact. Serving under the Executive Director are auditors and other officials who carry out the business of the Commission. The Commission has offices in Boulder, Colorado, Chicago, Illinois and New York, New York.

The Multistate Tax Compact grants the Commission various powers. For example, the Commission can issue regulations and prescribe uniform forms for the taxation of interstate business whenever the tax laws of two or more member states are similar or uniform. The Commission has adopted a number of regulations pursuant to this power, including regulations calling for combined reporting and full apportionment of the nonbusiness income of multistate taxpayers.[5]

The Commission is also empowered to conduct "interstate audits." The Commission may conduct such audits upon the request of one or more of the member states, or it may offer to conduct such audits based on its own determination that the proceedings would be of interest to the party states.[6] The Commission may also refuse to perform an audit requested by a state or states of the confederation.

Interstate audits are effectuated by the broad subpoena authority possessed by the Commission. The Commission may utilize the compulsory process of any court within the twenty-one member states in aid of its audit powers. Failure to comply with such process is punishable as contempt of the issuing court.

The Multistate Compact has not received the consent of Congress, although numerous bills have been intro-

[5] The power to issue regulations is contained in Article VII of the Compact. Such regulations are deemed advisory only unless adopted by the individual states. These regulations will be discussed more fully *infra*, pp. 17-20, 23-24.

[6] This independent power to audit taxpayers on a multistate basis is contained in Article VIII of the Compact. Article VIII is applicable only in those states which have specifically adopted it, but all members of the Compact have adopted it.

duced seeking such consent.[7] The appellants are all interstate business corporations and multistate taxpayers who have been subjected to demands by the Multistate Tax Commission to submit to interstate audits conducted by the Commission, pursuant to its regulations and practices. Appellants have refused such demands, in all cases offering to submit to lawful audits conducted by the states involved. The appellants have also offered to waive the applicable statutes of limitations while they pursued this action.

Proceedings Below

This action commenced with the filing of a complaint on August 11, 1972. An amended complaint was filed on January 10, 1973, seeking both a declaratory judgment that the Multistate Tax Compact, as then adopted by twenty-one states, was invalid under the United States Constitution, and a permanent injunction barring its operation and enforcement.

Before answering the complaint, appellees moved to dismiss the action on the ground that appellants had failed to state a claim upon which relief could be granted. Judge Tenney dismissed this argument as "frivolous," stating that the case would have to be decided on the merits. *See* 367 F. Supp. 107 (S.D.N.Y. 1973) (Appendix B, *infra*, pp. 22a).

[7] See S. 3892, 89th Cong., 2d Sess. (1966); S. 1551, 90th Cong., 1st Sess. (1967); S. 883, 90th Cong., 1st Sess. (1967); H.R. 13682, 90th Cong., 1st Sess. (1967); H.R. 9476, 90th Cong., 1st Sess. (1967); S. 1198, 91st Cong., 1st Sess. (1969); H.R. 9873, 91st Cong., 1st Sess. (1969); H.R. 6246, 91st Cong., 1st Sess. (1969); S. 1883, 92d Cong., 1st Sess. (1971); H.R. 6160, 92d Cong., 1st Sess. (1971); S. 3333, 92d Cong., 2d Sess. (1972); S. 2092, 93d Cong., 1st Sess. (1973). The member states and the Commission have lobbied vigorously for such consent. *See* Multistate Tax Commission Annual Reports, 1968-1975.

Appellees answered the complaint in September, 1973, and appellants filed a set of interrogatories in October.

By a memorandum order dated February 5, 1974 (Appendix F, *infra,* pp. 80a), Judge Tenney granted a motion by various multistate corporations to intervene as plaintiffs, and ordered the suit to proceed as a class action with appellants and intervenor-plaintiffs as class representatives.

In June, 1975, appellees moved for summary judgment and requested that the motion be heard by a three judge court. Appellants opposed the motion, arguing that substantial questions of fact needed to be resolved before it could be said that the Multistate Tax Compact did not affect the national interest, or the interests of states not members of the Compact, so as to require the consent of Congress. Additional facts also had to be developed to determine the degree and nature of the effect the Compact had on interstate commerce. Appellants further contended that the court should consider evidence on the operation and enforcement of the Compact, to determine if appellants were deprived of rights guaranteed them by the Fourth and Fourteenth Amendments.

In the alternative, appellants asked for summary judgment in their favor. They contended that under a proper construction of the Constitution, the Multistate Tax Compact was unconstitutional because it lacked the consent of Congress. Appellants also argued that the Compact as enacted encroached upon the commerce power of Congress.

The district court granted summary judgment in favor of appellees on July 14, 1976. In holding that

the Multistate Tax Compact does not require the consent of Congress, the court relied primarily on *Virginia* v. *Tennessee,* 148 U.S. 503 (1893), and *New Hampshire* v. *Maine,* decided June 14, 1976. The court held that the Compact does not increase the political power of the member states or interfere with the national interest.

The court also held that the Compact does not encroach upon the federal commerce power or unreasonably interfere with such commerce. The court stated that interstate taxation is not a matter of peculiar federal concern: "There is nothing inherent in the problems of multistate tax administration that would require federal regulation, nor has Congress yet identified these problems as a matter of peculiar federal concern." (App. A, *infra,* p. 13a.)

The decision also rejected the various arguments appellants had made under the Fourth and Fourteenth Amendments.

The opinion noted that related cases in various state courts have been stayed awaiting disposition of this action, and that three related suits were pending in other federal district courts. The Judicial Panel on Multidistrict Litigation, by order filed on February 8, 1976, deferred consideration of consolidation and transfer of these cases pending determination of this action.

Notice of appeal was filed September 7, 1976.

THE QUESTIONS ARE SUBSTANTIAL

I. THE COMPACT CLAUSE

A. The Scope of the Compact Clause

This case presents a constitutional question of significance and importance which has never been decided by this Court. The question is whether almost half the states of the Nation can join together under a compact which is designed to affect interstate commerce, and which creates an independent and regional administrative body, without the approval of Congress. Article I, Section 10 of the Constitution forbids any state from entering into an "Agreement or Compact" with any other state "without the Consent of Congress." Few cases questioning the validity of a compact lacking congressional consent have reached this Court, and the decisions have not been authoritative as far as the present question is concerned. *See e.g., Holmes* v. *Jenison,* 14 Peters 540 (1840); *Virginia* v. *Tennessee,* 148 U.S. 503 (1893); *Wharton* v. *Wise,* 153 U.S. 155 (1894); *North Carolina* v. *Tennessee,* 235 U.S. 1 (1914); *Virginia* v. *West Virginia,* 246 U.S. 565 (1918); *New Hampshire* v. *Maine,* decided June 14, 1976. No case has ever upheld the validity of a compact where many states are parties, and Congress has not given its consent.

The most frequently cited of these cases, and the one relied on below, is the opinion of Mr. Justice Field in *Virginia* v. *Tennessee.* In that case, the Court held that Congress had consented to the boundary settlement between Virginia and Tennessee that was the subject matter of the suit. Justice Field then went on to explain, in what was clearly a dictum, his understanding of the Compact Clause. He said (148 U.S. at 517-518):

> "The terms 'agreement' or 'compact' taken by themselves are sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects; to those to which the United States can have no possible objection or have any interest in interfering with, as well as to those which may tend to increase and build up the political influence of the contracting States, so as to encroach upon or impair the supremacy of the United States or interfere with their rightful management of particular subjects placed under their entire control."

This dictum was repeated in *North Carolina* v. *Tennessee, supra,* and *Virginia* v. *West Virginia, supra,* again in language not essential to the holdings. These cases both involved disputes arising from bilateral boundary settlements. Earlier this year, the Court cited Justice Field's explanation in yet another bilateral boundary case, after holding that the fundamental boundary dispute before the Court had been settled over two centuries earlier, and that no present legal adjudication was required. *New Hampshire* v. *Maine,* decided June 14, 1976.

Justice Field himself recognized the narrow scope of his statement in *Virginia* v. *Tennessee.* Writing one year later in *Wharton* v. *Wise, supra,* he stated that no compact was valid without the consent of Congress if it "might affect subjects placed under the control of Congress, such as commerce. . ." 153 U.S. at 171 (1894). In relying upon *Virginia* v. *Tennessee,* the District Court ignored this nearly contemporaneous explanation by Justice Field of the scope of the Compact Clause. That no narrow or strained reading of the Compact Clause is appropriate is evident from the manner in which Madison treats the Clause in *The*

Federalist (No. 43). He stated that the Clause falls "within reasonings . . . so obvious . . . that [it] may be passed over without remark." Indeed, there are dicta stating that Article I, Section 10 applies as written, without further gloss. Such an interpretation was advanced by Chief Justice Taney in *Holmes* v. *Jenison, supra.* This interpretation was also adopted by Mr. Justice Story (II Story, *Commentaries on the Constitution of the United States,* §1403 (5th Ed. 1891)), and urged by Henry Clay in *Green* v. *Biddle,* 8 Wheaton 1, 39-40 (1823). In *West Virginia ex rel. Dyer* v. *Sims,* 341 U.S. 22, 27 (1950), a case involving a multistate compact concerned with a regional pollution problem and approved by Congress, Mr. Justice Frankfurter stated, "The growing interdependence of regional interests, calling for regional adjustments, has brought extensive use of compacts. A compact is more than a supple device for dealing with interests confined within a region. That it is also a means of safeguarding the national interest is well illustrated in the Compact now under review. Not only was congressional consent required, as for all compacts; . . ."

Compacts among the states have increased dramatically in the past twenty years, and they are often used in situations much broader than the one time boundary settlements between only two states involved in *Virginia* v. *Tennessee, supra,* and *New Hampshire* v. *Maine, supra.*[8] Compacts now join together whole re-

[8] *See* the sections on "Interstate Compacts" in the biennial volumes of THE BOOK OF THE STATES, published by the Council of State Governments. *See also* RIDGEWAY, INTERSTATE COMPACTS: A QUESTION OF FEDERALISM; Engdahl, *Characterization of Interstate Arrangements: When is a Compact Not a Compact?,* 64 MICH. L. REV. 63 (1965). Ridgeway lists 36 compacts formed before 1920, 65 more between 1920 and 1955, and 40 more in the next 10 years alone.

gions, and create separate administrative bodies with continuous supervisory powers. Many of these compacts have obtained the consent of Congress.[9] In such cases, Congress has granted its approval only after a careful survey of non-party states and federal agencies to determine the actual and potential effects of the compact.[10] Such consent is usually restrictive, requiring further approval before changes in the compact may be made, or new members added. Congress has thus recognized its constitutional responsibility to scrutinize interstate agreements in the light of its conception of national policy, and to review any concentrations of power in the nation.

Other multistate compacts, however, have not obtained the consent of Congress. Relying on the dicta that appear in a number of boundary dispute cases, compacts like the Multistate Tax Compact have been put into operation despite the specific proscription of Section 10 of Article I. A clear and substantial question is thus presented as to the validity of this trend in

[9] The consent given to the Compact on Taxation of Motor Fuels Consumed by Interstate Buses and the Bus Taxation Proration and Reciprocity Agreement, Act of April 14, 1965, P.L. 89-11, 79 Stat. 58 is typical. *See* The Council of State Governments, INTERSTATE COMPACTS 1783-1956 for a compilation of past compacts considered by Congress, and the biennial volumes of THE BOOK OF THE STATES for compacts considered since 1956. See also Engdahl, *supra* note 8, at 69-73.

[10] For example, before consenting to the Compact on Taxation of Motor Fuels Consumed by Interstate Buses, Congress consulted the Commerce Department, the Justice Department, the Interior Department, the State Department, the Treasury Department, the Interstate Commerce Commission, and the District of Columbia (a jurisdiction affected because it is the headquarters for two major bus companies). *See* H.R. Rep. No. 102, 89th Cong., 1st Sess. (1965); S. Rep. No. 76, 89th Cong., 1st Sess. (1965).

American government, as to its scope if it is to be accepted beyond bilateral boundary, bridge, or extradition agreements, and as to the validity of the Multistate Tax Compact, in particular.

If this Court should decide that the correct test under the Compact Clause is that of Mr. Justice Field, requiring Congressional consent only if a compact interferes with the interest of other states or the federal government, this case still merits plenary consideration. A compact designed to transform interstate taxation cannot escape affecting the non-party states and the national interest, so as to be invalid in the absence of congressional approval. Moreover, Congress, and not a federal district court, should decide whether the Multistate Tax Compact unduly increases the political power of the confederating states or interferes with the national interest. Felix Frankfurter and James M. Landis noted that the considerations which led this Court to leave to Congress what constitutes a republican form of government are equally controlling in letting Congress circumscribe the area of agreement open to the states.[11] The opinion of a district court on motion

[11] Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685 (1925). *See also West Virginia ex rel. Dyer* v. *Sims*, *supra*, in which Justice Frankfurter stated (341 U.S. at 27): "Indeed, so awkward and unsatisfactory is the available litigious solution for these problems that this Court deemed it appropriate to emphasize the practical constitutional alternative provided by the Compact Clause. Experience led us to suggest that a problem such as that involved here is more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however consttituted." *See generally Developments in the Law: Federal Limitations on State Taxation of Interstate Business*, 75 HARV. L. REV. 953 (1962), which discusses the difficulties the courts would have in evaluating the consequence for interstate commerce of various interstate taxing schemes.

for summary judgment should not be allowed to stand as a major precedent in this area.

The substantiality of the questions presented is not diminished because the member states may do individually much of what is accomplished by Compact and Commission. The Constitution has balanced the conflicting demands of state sovereignty and federalism by permitting the states to act individually without the advance approval of Congress. Where the states proceed by "Agreement or Compact," however, the Constitution requires the advance consent of Congress. Individual action does not produce an on-going, independent body like the Multistate Tax Commission, not directly responsive to any electoral body, nor does reciprocal legislation grant state officials extensive extraterritorial powers. Continuing collective action presents a greater potential threat to those states not party to the confederation, and to federal supremacy. A multistate compact is inevitably an arrangement with power, quite distinguishable from individual state action, and the one place, one time bilateral agreements involved in *Virginia* v. *Tennessee* and *New Hampshire* v. *Maine*.

It is also no answer to note the purely "advisory" capacity of the Multistate Tax Commission, nor to emphasize that the member states may withdraw from the Compact at any time. To the extent the members take the advice, and to the extent they do not withdraw, a compact exists which requires the consent of Congress. As has been mentioned, all the member states have adopted Article VIII, giving the Commission the power to conduct multistate audits. The Annual Re-

ports of the Commission reveal that numerous multistate audits have been conducted, involving as many as thirteen states in one joint audit. By 1975, eight of the member states had adopted the regulations of the Commission calling for combined reporting and full apportionment of non-business income, and the Commission expects five more states to approve the rule before the end of 1976. Moreover, multistate audits conducted pursuant to these regulations have been accepted by states which have not adopted the regulations. Thus, despite some language characterizing the Compact as advisory and voluntary, the actions of the Commission and member states and the overall language of the Compact make it clear that the Compact and the Commission have momentum, and that they are transforming the interstate taxation system. This results from an "Agreement or Compact". It is important that this Court should itself determine whether such a far-reaching compact is one which requires the consent of Congress.

B. The Effect on States Not Party to the Compact

Plenary consideration of the validity of the Multistate Tax Compact is particularly important in light of the actual political and economic consequences of the Compact. The members of the Compact are primarily western states, and no major eastern, industrial state is now a member. Illinois withdrew as a full member recently, and New York severed its associate affiliation in 1971. New York feared a loss of sovereignty to the Multistate Tax Commission, which exercises continuous power uncontrolled by any one state.[12] Opposition

[12] *See* the discussion, and the letter of former Governor Rockefeller, at P-H State and Local Taxes, All States Unit ¶ 6612. *See also* Sharpe, *State Taxation of Inter-State Business and the*

is not confined to the eastern or industrial states, however. Florida withdrew as a member effective October 1, 1976. Arizona strongly opposes the Commission, considering it essentially a fourth level of government. Wisconsin also opposes the Commission, seeing it as a threat to the sovereignty of the states.[13] Alabama has agreed to join only if congressional review and approval can be obtained. In all, twenty-seven states have resisted joining the Compact since it was drafted ten years ago, and two states have abandoned their membership.

The Multistate Tax Commission has adopted rules and practices which call for the use of "combined reporting" and the "unitary business" concept." Under

Multistate Tax Compact: The Search for a Delicate Uniformity, 11 Col. J. Law & Soc. Problems 231 (1975).

[13] See Sharpe, *supra* note 12, citing a letter to the author from the Chairman of the Arizona State Tax Commission and testimony of the Wisconsin Tax Administrator before the staff of United States Senate Finance Subcommittee on Interstate Taxation in 1973.

[14] *See* the explanation of the Executive Director of the Multistate Tax Commission, Eugene Corrigan, at Corrigan, *Interstate Corporate Income Taxation—Recent Revolutions and a Modern Response*, 29 Vand. L. Rev. 423 (1976) and the explanation of the Audit Coordinator of the Commission, Frederick Cappetta, at Cappetta, *Joint Audit Program of the Multistate Tax Commission*, 33 Inst. on Fed. Tax. (N.Y.U.) 961 (1975). *See also* the articles extolling this method of taxation published in the Multistate Tax Commission Seventh Annual Report, 1974, and the frequent discussion of combined reporting and full apportionment in other Annual Reports.

This Court first dealt with this method of taxation in *Butler Bros.* v. *McColgan*, 315 U.S. 501 (1942). The Court declined to analyze both the apportionment formula involved and the potential for multiple taxation, and instead upheld the tax by requiring a multistate corporation attacking a state taxation system to prove by clear and cogent evidence that the tax results in multiple taxation.

these regulations, a taxpayer and its affiliated corporations (whether or not the latter are subject to the states' tax jurisdiction) are required to file a tax return reporting the entire net income of the whole group. This "combined" income is then apportioned under a formula based on property, payroll and sales, and a tax is levied without regard to whether the income being taxed was earned by a taxpayer subject to the jurisdiction of the state. This method of taxation may produce duplicate or multiple taxation, but its use has heretofore been confined to a few states.[15]

During discovery, appellants ascertained that the Commission has used combined reporting in dozens of audits, involving large sums of money. If the concept is adopted throughout the western United States, gross unfairness in interstate taxation can be avoided only through the efforts of some coordinating body. Mr. Corrigan has stated that his Commission is the only such body capable of mitigating the probability of mul-

---

[15] See the discussion in Sharpe, *supra* note 12. Recent editions of the Multistate Tax Commission Annual Reports have recognized the multiple taxation problems. The potential multiple taxation inherent in the unitary business and combined reporting concepts has also been criticized in Congress. *See, e.g.*, H.R. Rep. No. 1480, 88th Cong., 2d Sess., Vols. 1 and 2 (1964); H.R. Rep. No. 565, 89th Cong., 1st Sess., Vol. 3 (1965); H.R. Rep. No. 952, 89th Cong., 1st Sess., Vol. 4 (1965). *See also* the following bills: H.R. 11798, 89th Cong., 2d Sess. (1966); H.R. 1538, 92d Cong., 1st Sess. (1971); S. 317, 92d Cong., 1st Sess. (1971); H.R. 977, 93d Cong., 1st Sess. (1973); H.R. 9, 94th Cong., 1st Sess. (1975); S. 2080, 94th Cong., 1st Sess. (1975), *and* HEARINGS BEFORE THE SUBCOMMITTEE ON STATE TAXATION OF INTERSTATE COMMERCE OF THE SENATE COMMITTEE ON FINANCE, 93d Cong., 1st Sess. (1973). The Multistate Tax Commission has opposed many of these bills. Multistate Tax Commission Annual Reports, 1968-1975.

tiple taxation.[16] The non-Compact states are thus being pressured to join the Compact, and interstate business is unfairly taxed in the interim while the non-Compact states exercise their sovereign right to resist such pressure. The Director of the Multistate Tax Commission has indicated that members of Congress and the Treasury Department are opposed to combined reporting.[17]

The Commission has also issued regulations eliminating the distinction between business and non-business income.[18] Traditionally, non-business income, such as rents, interest, and dividends on investments, is allocated to the state of commercial domicile. The Commission, however, apportions such revenue among all

---

[16] Multistate Tax Commission Seventh Annual Report, 1974, at 50, *and* Corrigan, *supra* note 14, at 441-2.

[17] Corrigan, *supra* note 14, at 441. *See, e.g.*, S. 317, 92 Cong., 1st Sess. (1971) which would have prohibited combined reporting generally. S. 2080, 94 Cong., 1st Sess. (1975) would preclude worldwide combination. In 1976, the Task Force on Foreign Income of the House Committee on Ways and Means recommended that the Internal Revenue Code be amended to prohibit inclusion of foreign corporations in a combined report. The new income tax treaty between the United States and the United Kingdom, signed December 31, 1975, bans use of the unitary business and combined reporting concepts between the two countries when a United Kingdom parent company is involved. A protocol amending the treaty was announced September 2, 1976, but the ban on the use of the unitary business concept and combination reporting was not changed. The treaty has been sent to the Senate for its advice and consent. *See* 2 CCH TAX TREATIES ¶ 8103A.

[18] These regulations were adopted September 19, 1971 pursuant to article IV, and revised on February 21, 1973. *See* the explanation of the General Counsel of the Multistate Tax Commission in Dexter, *Taxation of Income from Intangibles of Multistate-Multinational Corporations*, 29 VAND. L. REV. 401 (1976). *See also* the articles cited *supra* note 14.

member states in which the business is present, either increasing the tax burden on interstate businesses, through multiple taxation of the same income, or depriving commercial centers like New York, Massachusetts, Pennsylvania, Ohio, and Illinois of revenue to which they have a legitimate, or at least, a traditional claim. If such commercial centers do not generally tax the non-business income allocated to them under traditional systems because they desire to attract business, as is the policy of New York, Pennsylvania and Massachusetts, the Multistate Tax Commission deprives them of this tax incentive. The Commission admitted in discovery that it had conducted multistate audits in which the traditional allocation of non-business income was eliminated.

Finally, the Commission does not allocate income under its regulations and practice to a state which does not tax such income. This "nowhere income," as it is called by Mr. Corrigan, is instead apportioned so as to be taxed,[19] again increasing the costs of interstate business and negating the decision of a sister state to stimulate its economy through tax incentives.

Such economic actions, taken on a regional basis, can be the source of conflict. A substantial question is presented as to whether Congress should approve the Multistate Tax Compact, and the Commission created by it, before it is allowed to pursue its economic and political policies.[20]

---

[19] *See* Corrigan, *supra* note 14; Dexter, *supra* note 18.

[20] The manner of adopting the regulations requiring combined reporting and full apportionment of non-business income illustrates the difference between uniform legislation and a multistate agreement, and reveals the dangers presented by a regional body un-

C. Effect of the Compact on the National Interest

The Multistate Compact interferes with the national interest in promoting low cost, efficient interstate business. The methods of determining the tax due used by the Multistate Tax Commission may result in dupulicate or multiple taxation, and the existence of the Compact and Commission produce additional expense and complexity in interstate taxation. The operations of the Commission and its apportionment regulations confirm that one of the purposes of the party states is to disregard their substantive tax laws so as to create an illusion of uniformity among the states and thus head off federal legislation. The Multistate Tax Compact was drafted when federal legislation on state taxation of interstate commerce was under active consideration in both Houses of Congress,[21] and the Executive Direc-

---

checked by any one state and operating without the approval of Congress. The adoption and utilization of the regulations also belie the Commission's characterization of its role as "advisory". The Uniform Division for Income Tax Purposes Act ("UDITPA"), 7 Uniform Laws Annotated 365 (1970), a model statute adopted by many Compact and non-Compact states, does not call for combined reporting and specifically preserves the distinction between business and non-business income. Rather than seek amendments to the law in those Compact states where UDITPA had been enacted, the Commission instead issued "advisory" regulations which negated important sections of this Act. The Commission then subjected multistate businesses to "advisory" audits under its own regulations. Its tax "recommendations" were then often accepted by the executive officials in charge of taxation in the various states, even in those states in which legislative representatives had adopted UDITPA and not the Commission's regulations. Commission representatives have indicated that the regulations are inconsistent with UDITPA and reflect the Commission's own view of the proper method of taxing interstate commerce, and not the system enacted by a majority of the states through UDITPA. *See* Dexter, *supra* note 18.

[21] *See* H.R. 11798 and H.R. 16491, 89th Cong., 2d Sess. (1966).

tor of the Multistate Tax Commission has said that one of the original purposes of the Compact was "simply killing congressional action in this field."[22] Congress has already regulated, and is considering further regulation of interstate taxation.[23] Congressional Committees have recognized the cost and confusion of letting the states control interstate tax law, and have acknowledged the need for uniformity.[24] The methods of the Commission are contrary to those embodied in bills proposed in Congress after lengthy study of interstate taxation by Congressional Committees.[25] In ad-

[22] *See* Mr. Corrigan's statements in *Taxation of Interstate Business*, PROCEEDINGS OF TAX FOUNDATION SEMINAR (April 16-17, 1970), p. 17. *See also* Multistate Tax Commission First Annual Report, 1968.

As indicated at p. 5, *supra*, P.L. 86-272, 73 Stat. 555 (1959), 15 U.S.C. §§ 381-4, was passed after the Court's decision in *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450 (1959). P.L. 86-272 established minimum jurisdictional standards for state taxation, and directed that a Congressional study of interstate taxation be made. This study resulted in a lengthy report highly critical of the states' handling of multistate taxation. Accordingly, bills were introduced to extend federal control in this area. It was in response to this development that the states convened to draft the Multistate Tax Compact. The citations for the report and legislative proposals are listed *infra* note 25.

[23] *See, e.g.*, P.L. 86-272, 73 Stat. 555, 15 U.S.C. §§ 381-4 and legislative action cited *infra* at note 25.

[24] *See* H.R. Rep. No. 1480, 88th Cong., 2d Sess., Vol. 1 (1964); H.R. Rep. No. 952, 89th Cong., 1st Sess., Vol. 4 (1965). *See also* the observations of Mr. Justice Frankfurter in *Northwestern States Portland Cement Co.* v. *Minnesota, supra*, 358 U.S. at 476-477 (dissenting opinion).

[25] *See e.g.*, H.R. Rep. No. 1480, 88th Cong., 2d Sess., Vols. 1 and 2 (1964); H.R. Rep. No. 565, 89th Cong., 1st Sess., Vol. 3 (1965); H.R. Rep. No. 952, 89th Cong., 1st Sess., Vol. 4 (1965). *See also* the following bills: H.R. 11798, 89th Cong., 2d Sess. (1966); S. 317, 92d Cong., 1st Sess. (1971); H.R. 1538, 92d Cong., 1st Sess.

dition, several states have called for federal laws to insure a level of uniformity in State and local law and practice, and reduce the risk of multiple taxation.[26] A determination of the validity of the system the Compact seeks to establish in the United States is particularly important in light of the subject matter of the Compact. The power to tax can be the power to destroy, but should not be while this Court sits, and in the silence of Congress.[27]

The Compact and Commission also interfere in the conduct of foreign affairs. Before appellants' discovery was terminated by the action of the court below, it was learned that the Commission has combined world-

(1971); H.R. 977, 93d Cong., 1st Sess. (1973); S. 1245, 93d Cong., 1st Sess. (1973); H.R. 9, 94th Cong., 1st Sess. (1975); S. 2080, 94th Cong., 1st Sess. (1975). *See also* HEARINGS BEFORE THE SUBCOMMITTEE ON FINANCE, 93d Cong., 1st Sess. (1973). The Annual Reports of the Multistate Tax Commission reveal that the Commission has vigorously opposed passage of any federal act that could solve the difficult problems inherent in interstate taxation.

[26] *See, e.g.*, the statement of the Chairman of the New York State Department of Taxation and Finance, the statement of the Assistant Attorney General of Florida, and the statement of the Chairman of the Arizona State Tax Commission *in* HEARING BEFORE THE SUBCOMMITTEE ON STATE TAXATION OF INTERSTATE COMMERCE OF THE SENATE COMMITTEE ON FINANCE, 93d Cong., 1st Sess. (1973), at 133, 367, 393.

[27] *See McCulloch* v. *Maryland*, 4 Wheaton 316, 413 (1919); *Panhandle Oil Company* v. *Mississippi ex rel.* Knox, 277 U.S. 218, 223 (1928) (dissenting opinion of Justice Holmes).

The District Court tested appellants' arguments that the Compact affects an area of federal concern against the standards of the Commerce Clause. Of course, if the Compact Clause is to have any meaning, the effect of a compact on the national interest in efficient interstate commerce need not constitute a violation of the Commerce Clause before the consent of Congress is required. *See, e.g.*, *Wharton* v. *Wise, supra*, 153 U.S. at 171.

wide income and apportioned it to some of the Compact states. The United Kingdom sought protection from this state practice in its latest tax treaty negotiations with the United States. The Treasury Department has also received numerous requests from other nations seeking protection from combined reporting.[23] Overlapping international claims to portions of the same tax base will lead to multiple taxation unless the foreign government recognizes the legitimacy of the income reallocation imposed by the Commission, and allows the taxpayer correlatively to reduce its income or its local tax liability. It is doubtful, however, that a foreign government will so defer to the Multistate Tax Commission. The foreign government may justifiably believe that its arm's length standard is more objective than the unitary business concept. The foreign government may also question the apportionment methods unilaterally chosen by a region of the United States. Finally, the Commission "recommends" taxation of world-wide income without regard to restrictions on currency repatriation and exchange revaluations, and without considering that such income may be taxed again when paid in dividends. The practices of the Commission should not be considered valid until Congress has consulted the State Department, Treasury Department, and other agencies to determine if such practices are in the national interest, and has then acted affirmatively to approve the Compact.

---

[23] *See* Report of the Department of State to the President, June 8, 1976: "This method of assessment, which includes the burden of producing worldwide records of all of the affiliated companies, has raised many objections by our treaty partners and we are now seeking to deal specifically with this problem in our treaties." CCH Tax Treaties ¶ 8103 EE.

II. THE COMMERCE CLAUSE

A. The Burdens on Interstate Commerce

The Multistate Tax Compact also unreasonably burdens interstate commerce. The Compact, and the Commission created under it, produce confusion, inefficiency, inconsistent tax determinations, and multiple taxation. Standards for compliance are unclear, and remedies inadequate. Determining what constitutes a "unitary business," for example, is extremely difficult. No objective standards exist, and the very broad definition advanced by the Commission creates a serious potential for misallocation. The more attenuated the interdependence between the taxpayer and the income and assets of the rest of the group, the greater the risk of improperly allocating to a certain state or country income earned in another. If a narrower definition is attempted, administrability is diminished and expense increased as more and more frequent resort is made to case by case determinations.

The cost of compliance and enforcement is further exacerbated by the fact that a taxpayer must file data concerning not only its own operation, but also data concerning sales, payrolls, and properties of legally separate corporations, including those organized and operated in foreign countries. The cost to the taxpayer of obtaining and processing the data of a large multistate or multinational organization in order to determine the taxable income of one small part of the organization may be excessive, particularly when different accounting systems are used in other states or abroad. Moreover, there is some question as to whether the Commission can compel an unwilling affiliate to produce its records from other states or nations.

The "voluntary" and "advisory" arrangements characteristic of the Compact and Commission also unreasonably burden interstate commerce, creating another layer of cost and complexity in interstate taxation and hindering the effort to foster a national common market through inexpensive and efficient interstate business. Since no state can be bound by the results of an interstate audit which it considers unfavorable, a multistate business may be forced to submit to a state audit after absorbing the expense of an audit by the Commission. If several states accept the result of an audit conducted by the Commission, and the taxpayer objects, the only remedy lies in the separate administrative or judicial tribunals of each state. Further, review of an acceptance or rejection of a Commission audit by such tribunals will not bind the other states. It is thus entirely possible that an interstate business would be forced to litigate the results of an interstate audit in all twenty-one allied states.

The interstate audit will be conducted in the first place pursuant to both, or either, the Commission's advisory regulations (as adopted or not by the member states) and the laws of the member states. It is not surprising that multistate taxpayers question the fairness or accuracy of such audits. Although separate suits could perhaps correct these problems after they occur, or Congress could correct them legislatively after occurrence, the clear violation of the Commerce Clause inherent in such actions is further reason for this Court to review the decisions below before grave harm to the national interest is done.

III. FOURTEENTH AMENDMENT

As discussed more fully above, the system of taxation established by the Multistate Tax Compact contains unclear and inconsistent standard for compliance, and prescribes remedies that are costly, inefficient, and inadequate. Taxes may be imposed by state officials under "advisory" regulations not adopted by the taxing state, and perhaps even in conflict with the laws of the state. When this is done on a multistate basis, under the influence of the Compact, taxes assessed by the member states may violate the Due Process guarantee of the Fourteenth Amendment. The Commission's broad definition of a "unitary business" may also violate Due Process.[20] The confusion and expense produced by the enactment of the Compact and its operation through regulations and audit practices, to which Congress has not given its consent, requires this Court to review the validity of the Compact before the guarantees of the Fourteenth Amendment are ignored on a wholesale and concerted basis.

---

[20] *See Hans Rees' & Sons* v. *North Carolina*, 283 U.S. 123 (1931): Mr. Corrigan believes that affiliates not subject to the jurisdiction of a particular state may nevertheless be taxed by that state under combined reporting and the unitary business concept, stating particularly that jurisdiction is "irrelevant." *See* Corrigan, *supra* note 14, at 440.

CONCLUSION

The questions presented by this appeal are substantial and require decision by this Court. Probable jurisdiction should be noted.

Respectfully submitted,

ERWIN N. GRISWOLD
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

THOMAS MCGANNEY
14 Wall Street
New York, New York 10005

Attorneys for Appellants

Of Counsel:

JONES, DAY, REAVIS & POGUE
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

RICHARD A. HOPPE
TODD B. SOLLIS

WHITE & CASE
14 Wall Street
New York, New York 10005

SHEARMAN & STERLING
53 Wall Street
New York, New York 10005

November, 1976